Ying Cheng Ang v Taro Imanaka

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO 12–11 OF 1995
HAIDAR J
5 DECEMBER 1996

Civil Procedure *— Jurisdiction — Libel — Whether libel was published in Malaysia — Letter written and sent from Malaysia to person in Japan — Whether court in Malaysia had jurisdiction over the matter*

Tort *— Defamation — Libel — Libellous statement in letter — Whether there was publication to a third party — Whether there was libel*

The plaintiff filed an action in libel against the defendant at the sessions court. The defendant applied for the statement of claim to be struck out and for costs of the application on the grounds that (i) the alleged libel was committed outside Malaysia as it was addressed to one T Nagai, a citizen of Japan who resided in Japan at the material time; (ii) at the material time the defendant was residing in Singapore and if there was a libel, the alleged libel was communicated in Japan and/or Singapore; and (iii) there was no publication of the libel in Malaysia. The plaintiff opposed the application on two grounds, namely (i) that the publication of the libel was written and sent by the defendant from Johor Bahru and therefore the court had jurisdiction to hear the summons; (ii) if the court was of the opinion that it had no jurisdiction, then the defendant had submitted to the jurisdiction of the court by (a) entering an unconditional appearance; (b) applying and obtaining an order from the court for the plaintiff to provide security for costs. The sessions court dismissed the defendant's application. The defendant appealed and the issues for determination were questions of law, namely (i) jurisdiction; and (ii) forum non conveniens.

Held, allowing the defendant's appeal:

(1) In a defamation action, there must be publication to a third party. In this case the alleged letters were addressed to T Nagai in Japan. Clearly such letters could not possibly be publicized for the purpose of libel as the alleged letters were not published to a third party (see p 69C–F). The tort, if any, was committed in Japan where the publication took place, and not in Malaysia. It followed therefore that the court in Malaysia had no jurisdiction in this matter (see p 69I).

(2) The application by the defendant for security for costs was not a submission to the jurisdiction of the court here. It was merely a step taken to ensure that the costs of the defendant were ensured and nothing more (see p 70C–E).

(3) The forum non conveniens would be either in Japan or Singapore (see p 70G).

[Bahasa Malaysia summary

Plaintif telah memfailkan suatu tindakan dalam libel terhadap defendan di mahkamah sesyen. Defendan telah memohon supaya pernyataan tuntutan dibatalkan dan kos untuk permohonan tersebut atas dasar bahawa (i) libel tersebut telah dilakukan di luar Malaysia oleh kerana ianya telah dikemukakan kepada T Nagai, seorang warganegara Jepun yang bermastautin di Jepun pada masa yang berkenaan; (ii) pada masa yang berkenaan defendan sedang bermastautin di Singapura and jikalau terdapatnya suatu libel, maka libel tersebut telah dilakukan di Jepun dan/atau Singapura; dan (iii) tidak ada penerbitan libel itu di Malaysia. Plaintif telah membantah terhadap permohonan tersebut atas dua dasar, iaitu (i) bahawa penerbitan libel itu telah ditulis dan dihantar oleh defendan dari Johor Bahru dan oleh kerana itu mahkamah mempunyai bidang kuasa untuk mendengar saman tersebut; (ii) jikalau mahkamah berpendapat bahawa ianya tidak ada bidang kuasa, maka defendan adalah tertakluk kepada biang kuasa mahkamah kerana ianya telah (a) memasukkan kehadiran tak bersyarat; (b) memohon dan telah mendapatkan perintah mahkamah supaya plaintif memperuntukkan sekuriti kos. Mahkamah sesyen telah menolak permohonan defendan. Defendan telah merayu dan isu untuk diputuskan adalah persoalan undang-undang, iaitu (i) bidang kuasa; dan (ii) forum non conveniens.

Diputuskan, membenarkan rayuan defendan:

(1) Dalam suatu tindakan fitnah, sepatutnya ada penerbitan kepada pihak ketiga. Dalam kes ini surat-surat telah dikemukakan kepada T Nagai di Jepun. Jelasnya surat-surat tersebut telah tidak diterbitkan untuk tujuan libel kerana surat-surat tersebut telah tidak diterbitkan kepada pihak ketiga (lihat ms 69C–F). Tort tersebut, jikalau ada, telah dilakukan di Jepun di mana penerbitannya telah berlaku, dan bukannya di Malaysia. Maka mahkamah di Malaysia tidak mempunyai bidang kuasa dalam kes ini (lihat ms 69I).

(2) Permohonan oleh defendan untuk sekuriti kos bukanlah penyerahan kepada bidang kuasa mahkamah di sini. Ianya hanyalah suatu langkah yang diambil untuk memastikan kos dari defendan dan tidak lebih daripada itu (lihat ms 70C–E).

(3) Forum non conveniens adalah di Jepun ataupun Singapura (lihat ms 70G).]

Notes

For a case on the publication of libel, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) para 206.

Cases referred to

American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor [1995] 1 AMR 253 (refd)

A *Diamond v Bank of London & Montreal Ltd* [1979] 1 All ER 561 (folld)

Legislation referred to

Courts of Judicature Act 1964 ss 65, 68
Subordinate Courts Act 1948 ss 65

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Ibrahim bin Hashim (*Hassan Ibrahim & Co*) for the appellant.
SP Soo Hoo (*Arthur Lee & Co*) for the respondent.

Haidar J: Taro Imanaka (the plaintiff who is now 'the respondent' in this C action) filed an action against Ying Cheng Ang (the defendant who is now 'the appellant' in this action) in the Sessions Court, Johor Bahru on 13 April 1994 (pp 3–20 of the record of appeal). It is an action relating to alleged libel committed by the appellant towards the respondent.

The appellant by way of an amended originating application applied for the following:

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(1) that Summons No 53–179–94–2 and the statement of claim filed by the respondent against the appellant are invalid and be struck out;

(2) that costs of the application be taxed and/or unless agreed, be paid by the respondent to the appellant.

E The grounds are set out in the affidavit of the appellant himself (p 31 of the record). They are:

(1) The alleged libel as stated in para 3 of the statement of claim of the plaintiff was committed outside Malaysia as it was addressed to one T Nagai, a citizen of Japan who resided in Japan at the material time;

F (2) At the material time the appellant was residing in Singapore and if there was libel, the alleged libel was committed in Japan and/or Singapore;

(3) There was no publication of the alleged libel in Malaysia;

(4) The respondent's claim is outside the jurisdiction of the court here;

G (5) The action filed is invalid in law on the ground that the matter is outside the jurisdiction of the court here.

The respondent opposed the application on two grounds, namely:

(1) The publication of the alleged libel in para 3 of the statement of claim was written and sent by the appellant from Johor Bahru and therefore H the court here has the jurisdiction to hear the summons;

(2) If on the facts, the court were to rule that it has no jurisdiction, then the appellant had submitted to the jurisdiction of the court here by taking the following steps:

(i) The appellant had entered an unconditional appearance (exh TI1).

I (ii) The appellant by way of his application on 16 July 1994 obtained an order from the court here for the respondent to provide security for costs in the sum of RM20,000 (exh TI2).

The respondent thereby contended that the court here has the jurisdiction to hear his summons filed therein.

The learned sessions court judge on 27 April 1995 dismissed the appellant's original application with costs in the cause. She ordered that the summons and the statement of claim of the respondent be amended and the consequential order that the appellant file his statement of defence on the service of the summons and the amended statement of claim by the respondent (see pp 50–51 of the record).

The appellant appealed against the said order of the learned sessions court judge (pp 1–2 of the record).

When the appeal came before me on 20 September 1996, and after hearing both counsel, I allowed the appeal with costs and set aside the said order of the learned sessions court judge.

The respondent appealed against my order.

Preliminary

As the matter was filed in the sessions court, it appears therefore that the claim of the respondent would not exceed RM250,000. The civil jurisdiction of the sessions court is provided by s 65(1) of the Subordinate Courts Act 1948 which reads:

> Subject to the limitations contained in this Act, a sessions court shall have:
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> (a) unlimited jurisdiction to try all actions and suits of a civil nature in respect of motor vehicle accidents, landlord and tenant and distress; and
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> (b) jurisdiction to try all other actions and suits of a civil nature where the amount in dispute or the value of the subject matter does not exceed RM250,000.

Going by the nature of the respondent's claim, s 65(1)(b) would be applicable. In that event the plaintiff is caught by s 68(1)(a) of the Courts of Judicature Act 1964 where leave of the Court of Appeal is required first before the plaintiff can appeal against my order. In the circumstances the notice of appeal filled would not be in order.

Be that as it may, I will now give my reasons for the order that I made.

The issues for my determination were essentially of law. The issues are:

(1) Jurisdiction.

(2) Forum non conveniens.

Jurisdiction

The contention of counsel for the appellant that both parties were working in Singapore and therefore there would be no cause of action here could not be accepted. In paras 1 and 2 of the statement of claim it was merely pleaded that both parties were working in Singapore (at least for the

A appellant up to 2 December 1992). It did not necessarily mean that both parties were residing in Singapore. As Johor Bahru is just across Singapore, there could be a possibility that both parties or at least one of them (maybe the appellant) being a resident of Malaysia, resided in Johor Bahru. In any event there has been no affirmative facts that both parties resided in B Singapore. Hence, I could not accept the contention of the appellant's counsel on this aspect.

There was however merit in the contention of counsel for the appellant that in a defamation action there must be publication to a third party. In this respect, this is what is stated in *Law of Defamation in Malaysia and Singapore* at p 24:

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> Unlike the case of criminal libel where publication to the prosecutor (or complainant) alone is sufficient and there is no need to publish the defamatory material to a third party, the tort of libel requires the defamatory statement to be published to a third party. *If the defamatory material is sent to the person of whom it is written, that is not publication for the purposes of libel.*
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> D Publication has been defined as 'making known the defamatory matter *after it had been written to some person other than the person to whom it is written*,' per Lord Evershed MR in *Pullman v W Hill & Co Ltd* [1891] 1 QB 524 at p 527. (Emphasis added)

In this case, as admittedly stated in para 3 of the statement of claim, the E alleged letters were all addressed to one T Nagai in Japan. Nowhere was it pleaded by the respondent that the alleged letters were sent to others other than this T Nagai in Japan. Clearly therefore such letters could not possibly be publicized for the purpose of libel as the tort of libel requires the defamatory statement to be published to a *third party*.

F In the circumstances on this ground alone the learned sessions court judge should have allowed the application of the appellant.

Counsel for the appellant further submitted that even if there was a cause of action, it was outside the jurisdiction of Malaysia. He said so because the alleged letters were sent to T Nagai in Japan. He relied on the case of *Diamond v Bank of London & Montreal Ltd* [1979] 1 All ER 561 G where at p 564 Lord Denning MR said:

> ... Much nearer to the present case are cases of publication of libel. *When a letter or paper is sent from one country to another, the tort is committed in the place where the publication takes place.* This is shown in *Bata v Bata* [1948] WN 366.

H It would seem that the tort, if any, was committed in Japan and not here. It follows therefore that the court here has no jurisdiction and the learned sessions court judge should have ruled accordingly in favour of the appellant on the ground of jurisdiction.

The contention of counsel for the respondent that the letters were I sent from Johor Bahru was not supported by evidence. Even if the letters were sent from Johor Bahru, the answer is provided in the case of *Diamond v Bank of London & Montreal Ltd*, that is the alleged tort was committed in the place where the publication took place, namely Japan.

As regards the submission of Cik Soo, counsel for the respondent, on the two steps taken by the appellant which amounted to submission to the jurisdiction of the court here, she intimated that she would not be pursuing the issue of unconditional appearance entered by the appellant. That left me with the remaining issue of the application of the appellant for security for costs. Did that action amount to submission to the jurisdiction of the court here?

Cik Soo relied on 1 *Supreme Court Practice* 1979 at p 91. From what is stated on p 91 it would seem that what steps amount to submission to jurisdiction are still not clear and unsettled. Be that as it may the steps taken to file an application for security for costs, in my view, could not be considered as submission to jurisdiction as the nature of the action is purely to see to the security of costs for the appellant. Whatever subsequent steps taken by the appellant like filing an application as in this case, if the appellant is successful, would involve costs and hence it should not be construed as submission to the jurisdiction of the court here. It is merely a step taken to ensure that the costs of the appellant are secured and nothing more.

In the circumstances, I did not agree with Cik Soo's submission on this issue.

Forum non conveniens

Apparently the damages, if any, arising out of the alleged tort of libel, in my view, would be in Japan where the alleged defamatory publication was sent to. Assuming that the alleged defamatory publication was addressed to T Nagai by virtue of his position in Nagai Chemical Industry Ltd vis-a-vis Singapore Nagai Pte Ltd, the damages, if any, would at most be in Singapore. Either way it could not possibly have been committed in Malaysia. Hence the forum non conveniens would be either Japan or Singapore (see *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 AMR 253).

In the circumstances the learned sessions court judge should have allowed the appellant's application.

For the reasons set out by me I allowed the appeal and set aside the order of the learned sessions court judge. Costs are ordered to be given to the appellant.

Appeal allowed.

Reported by Kenneth Goh